

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the matter of:

CLIFFORD W. PERHAM, INC., A SUBSIDIARY OF
SHAW'S SUPERMARKETS, INC.

Employer,

Case No. 01-RC-191238

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS
LOCAL UNION NO. 340,

Petitioner.

**EMPLOYER'S REQUEST FOR REVIEW
OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PROCEDURAL HISTORY.....	3
III.	STANDARD OF REVIEW	4
IV.	SUMMARY OF THE FACTS	5
V.	ARGUMENT.....	13
A.	Review Should Be Granted Because the Regional Director Incorrectly Overrode Settled Multi-Location Unit Principles With an Inapposite Application of <i>Specialty Healthcare</i> Unit Principles.	13
B.	Review Should Be Granted Because Even Under <i>Specialty Healthcare</i> the Petitioner Sought a Unit Fragment.	15
C.	Review Should Be Granted Because Even Under <i>Specialty Healthcare</i> the Petitioner Sought an Inappropriate Combination of Employee Groups Whose Community of Interest Was Less Than the Community of Interest With the Excluded Employees..	17
D.	Review Should Be Granted Because The Decision Does Not Explain Why the Petitioned-For Group Has Distinct Interests That Outweigh All the Similarities With the Methuen Drivers.	18
E.	Review Should Be Granted Because the Regional Director Improperly Allowed Extent of Organization to Control the Unit Determination.	20
VI.	CONCLUSION.....	21

TABLE OF AUTHORITIES

Cases

<i>Constellation Brands, U.S. Operations, Inc. v NLRB</i> , 842 F. 3d 784 (2 nd Cir. 2016)	18, 19
<i>Laboratory Corp. of America Holdings</i> , 341 NLRB 1079 (2004)	14
<i>Odwalla, Inc.</i> , 357 NLRB 1608, 1612-1613 (2011)	17, 18
<i>Specialty Healthcare & Rehabilitation Center of Mobile</i> , 357 NLRB 934 (2011), <i>enf. sub nom Kindred Nursing Centers East, LLC v. NLRB</i> , 727 F. 3d 552 (6 th Cir. 2013)	<i>passim</i>
<i>State Farm Mutual Automobile Insurance Company</i> , 158 NLRB 925 (1966).....	14

Statutes

29 U.S.C. § 9(c)(5)	2, 20
---------------------------	-------

Regulations

NLRB Rules and Regulations §102.67	1, 4, 5
--	---------

Treatises

<i>An Outline of Law and Procedure in Representation Cases</i> (NLRB Office of the General Counsel), Section 13.00, pp. 152 – 153 (2012)	13
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I. INTRODUCTION

Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, Clifford W. Perham, Inc., a subsidiary of Shaw's Supermarkets, Inc. ("CWP") presents compelling reasons to grant review of the Regional Director's Decision and Direction of Election dated February 15, 2017 (the "Decision"). After the election on March 1, 2017, the Regional Director issued a Certification of Representative on March 9, 2017, so this Request for Review is timely filed within 14 days thereafter.

CWP operates a highly integrated distribution (trucking) operation for Shaw's Supermarkets in five New England states. Strictly as a function of its family-business history, CWP operates from three locations stretching across about 90 highway miles -- a refrigerated distribution center for perishables in Methuen, Massachusetts; a non-refrigerated distribution center for dry goods 60 miles away in Wells, Maine; and a mechanical (repair) facility another 30 miles farther in Scarborough, Maine, where some of the centralized management offices are also located.

Despite the physical separation of its facilities, CWP is unquestionably a single, fully integrated transportation company. CWP serves only one "customer" (154 Shaw's and Star Market stores). Job classifications and duties are identical between and among the drivers and yardmen at Methuen and Wells, and the mechanics at Methuen and Scarborough. Drivers from the two distribution centers deliver perishables or dry goods (respectively) to the exact same 154 retail stores, sometimes at the same time. Daily, drivers deliver and pick up and deliver loads between the two distribution centers. The two distribution centers are fully integrated with the third location, the mechanical facility at Scarborough. CWP has centralized supervision and labor relations, overlapping and coordinated dispatching, one set of personnel policies, one wage scale for all drivers, one set of employee benefits, and considerable functional and interpersonal

integration between and among all the drivers and mechanics, regardless of their reporting locations.

The Petitioner sought a fractured unit of only two locations – the drivers and yardmen at the dry goods distribution center in Wells, and the mechanics at the mechanical facility in Scarborough. CWP advocated for a unit of all three locations, including the perishables distribution center (with its drivers, yardmen, and mechanics) in Methuen.

Applying the Board’s traditional legal and factual standards for multi-location unit determinations, the Regional Director expressly found that CWP correctly advocated for the *smallest appropriate unit* (consisting of all three of the highly integrated locations in this trucking operation). Under those standards, the Regional Director also expressly found that the Petitioner petitioned for an *inappropriate unit* (consisting of only two out of the three highly integrated locations).

Nonetheless, the Regional Director ordered an election in the petitioned-for two-location unit otherwise deemed inappropriate, by incorrectly applying the principles of *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enf. sub nom Kindred Nursing Centers East, LLC v. NLRB*, 727 F. 3d 552 (6th Cir. 2013) (“*Specialty Healthcare*”). In reaching this result the Regional Director also effectively allowed the extent of organization to control, an impermissible result under Section 9(c)(5) of the Act, 29 U.S.C. §9(c)(5).

CWP respectfully requests that the Board grant this Request for Review, reject the Regional Director’s unit determination, and adopt the unit determination dictated by the controlling Board case law, already tentatively approved by the Regional Director, and advocated by CWP.

II. PROCEDURAL HISTORY

This is not the first occasion for the Board to consider the appropriate unit at CWP.

In 1999, a different Teamsters Local Union petitioned to represent only the Methuen distribution center, and the Acting Regional Director rejected that unit as inappropriate. (*See* Er. Ex. 13, Decision and Direction of Election in Case No. 1-RC-21098)¹

In 1999 CWP operated from four locations -- the same Methuen perishables distribution center, the same Wells dry goods distribution center, the same Scarborough mechanical facility, and also a specialty products distribution center in East Bridgewater, Massachusetts, now no longer in operation. (Er. Ex. 13, at 2) Much as today, Scarborough was an administrative office center and the mechanical facility. Much as today, each distribution center concentrated in certain types of products, so that in combination the three distribution centers distributed the full range of products to the exact same retail stores. (*Id.*)

In 1999, the Acting Regional Director concluded that the Methuen distribution center alone was not an appropriate unit, despite the Board's longstanding presumption favoring a single location unit. (*Id.* at 7 – 10) The Acting Regional Director concluded that the only appropriate unit was all four facilities, due (*inter alia*) to the highly integrated operations, centralized control over daily operations and labor relations, common employee skills and functions, common general working conditions, and functional interchange among the employees. (*Id.*)

On August 5, 2015, the United Food and Commercial Workers filed a petition seeking to represent drivers, yardmen and mechanics at all three of today's CWP locations (Methuen, Wells

¹ Citations to the transcript shall be identified as "T. ___" with the page number. Board exhibits shall be "Board Ex. ___;" employer exhibits shall be "Er. Ex. ___;" and union exhibits shall be "U. Ex. ___."

and Scarborough) A Teamsters affiliate of the present Petitioner intervened. (Case No. 01-RC-157449) The parties entered into a Stipulated Election Agreement for a voting unit of all full-time and regular part-time drivers, yardmen, and mechanics employed at Methuen, Wells and Scarborough. In the election conducted on September 2 and 4, 2015, 85 employees voted “no union,” 60 voted to be represented by the Teamsters, and two voted to be represented by the UFCW. (*See* Case No. 1-RC-157449)

Only 17 months later the Petitioner filed the instant petition on January 13, 2017, seeking to represent just the drivers and yardmen at Wells, and mechanics and the parts specialist at Scarborough, but (contrary to CWP) excluding the drivers, yardmen, and mechanics at Methuen. Region One conducted a hearing lasting a full day on January 23, 2017. It is undisputed that both parties anticipated filing briefs at the close of the record, and the Regional Director denied those requests and ordered oral argument, which was conducted after a break of about 30 minutes. (T. 155) The Region then consumed the next three weeks to issue the Decision on February 15, 2017.

At the election on March 1, 2017, 37 employees voted “yes” for the Petitioner, and 31 employees voted “no union.” The Regional Director issued the Certification of Representative on March 9, 2017. CWP requests review of the Decision.

III. STANDARD OF REVIEW

The Board will grant review of a Regional Director’s decision where, as here, compelling reasons exist. Section 102.67(d)(1), (2) and (4) of the NLRB Rules and Regulations elaborate with specific grounds for review: a substantial question of law or policy has been raised because of the absence of, or a departure from, officially reported Board precedent; the Regional Director’s decision on a substantial factual issue was clearly erroneous on the record and such

record prejudicially affects the rights of a party; and there are compelling reasons for reconsideration of an important Board rule or policy. This request satisfies those grounds.²

IV. SUMMARY OF THE FACTS³

CWP is a subsidiary of Shaw's Supermarkets. Shaw's operates 154 retail food stores (Shaw's or Star Market) in five New England states -- Massachusetts, Connecticut, Maine, New Hampshire and Vermont. (T. 15 – 16, 21- 23) CWP performs the distribution (trucking) function for Shaw's. (T. 15 – 16, 21 – 23, 31 – 32) CWP supports the Shaw's warehousing operation, but does not employ any warehouse personnel or perform any warehouse functions. (T. 31) Shaw's itself, headquartered in East Bridgewater, Massachusetts, is a subsidiary of the much larger Albertson's, a \$60 billion enterprise operating throughout much of the nation, with many distribution centers and stores, and including several other store chains. (T. 21 – 23)

CWP's peculiar geographic arrangement is unique within the massive Albertson's organization and within the industry generally – namely, a distribution operation supporting a retail food store chain with a separate perishables distribution center (Methuen) 60 miles from the dry goods distribution center (Wells), and a separate primary mechanical/repair location (Scarborough) another 30 miles past Wells. (T. 12 – 17, 21-22) In the industry, the three functions (perishables distribution, dry goods distribution, and mechanical repairs and maintenance) are conducted from the same location. (T. 16)

CWP's peculiar geographic arrangement is unrelated to the location of stores served by each distribution center – because Methuen and Wells serve the exact same 154 stores in five states. Drivers from Methuen and Wells can even make deliveries to the same stores

² CWP is not seeking review based on the conduct of the hearing or any ruling made in connection with the proceeding. See NLRB Rules and Regulations, Section 102.67(d)(3).

³ The facts were not disputed. CWP provides a concentrated version of the more detailed facts from the Decision, adding citations to the transcript and exhibits.

simultaneously, when their schedules and routes overlap. (T. 94) The geographic arrangement stems from the manner in which CWP grew as a family business before it became a Shaw's subsidiary. (T. 16 – 17)

CWP has one common management and operational structure, with site-based supervision only at the lowest levels. (*See* Er. Ex. 1) Director of Transportation Jeffrey Wermuth oversees the entire CWP operation and his office is in Methuen. (T. 12, 20, *and see* Er. Ex. 1) Transportation Manager Peter Holmes oversees all trucking operations, manages all drivers and yardmen, and his office is in Wells. (T. 24, *and see* Er. Ex. 1) Shop Superintendent Joe Fournier oversees all vehicle maintenance, manages all mechanics, and his office is in Scarborough. (T. 24, *and see* Er. Ex. 1)

Parts ordering and distribution for all locations is conducted from Scarborough. (T. 14) Payroll functions for all locations are conducted by office personnel located at Scarborough. (T. 20 - 21) Fleet safety functions for Methuen and Wells are supervised and coordinated by one of the Wells supervisors, Robert Rousseau. (T. 41 – 42, 99, *and see* Er. Exs. 11, 12) Drivers from Methuen and Wells serve together on a safety committee, the membership of which rotates among the drivers, and which meets monthly. (T. 89 - 91)

Each distribution center has its own superintendent and first line supervisors for the trucking operations. (T. 24 – 25, *and see* Er. Ex. 1) Scarborough has 13 mechanics, and this group performs most of the heavy repairs for the entire fleet – from any location – when the repairs are kept in-house (not sent to vendors). (T. 13, 46, 63 - 65) Methuen has a smaller mechanical shop with five mechanics, and a Shop Supervisor, J.K. Bergeron, who reports to Mr. Fournier in Scarborough. (T. 25, *and see* Er. Ex. 1)⁴ The Methuen mechanics tend to perform

⁴ Mr. Bergeron is variously referred to as “shop superintendent” or “shop supervisor” at Methuen. *Compare* Er. Ex. 1 and T. 25 (“superintendent”) with T. 26 and 84 (“supervisor”). But it is undisputed that Mr. Bergeron reports

lighter mechanical repairs and preventive maintenance. (T. 63 - 65) The Scarborough mechanics also perform these same types of lighter repairs and maintenance. (*Id.*) Trailers that reach the end of their useful lives are almost all decommissioned at Scarborough by the Scarborough mechanics. (T. 66 – 67)

At 9:00 AM each workday morning, Director of Transportation Wermuth (located in Methuen) has a conference call with (a) Transportation Manager Holmes (located in Wells), (b) the superintendents from Methuen and Wells, and (c) the inbound coordinator from the Shaw's corporate offices (located in West Bridgewater, Massachusetts), to discuss delivery issues, safety issues, the organization's ongoing performance on Key Performance Indicators, and other operational concerns. (T. 82 - 84) Mr. Wermuth travels from his Methuen office to Wells and Scarborough at least weekly. (T. 84 – 85) Transportation Manager Holmes travels from his office in Wells to Methuen about bi-weekly. (*Id.*) Shop Superintendent Fournier (who manages all the mechanics) travels once or twice weekly from Scarborough to Methuen, at least partly to deliver parts from the centralized parts operation at Scarborough. (*Id.*) Methuen's Shop Supervisor Bergeron (Methuen's supervisor of mechanics, who reports to Mr. Fournier) similarly travels to Scarborough at least once per week. (*Id.*)

Job classifications and actual job duties are identical throughout all locations – Methuen and Wells drivers and yardmen, and Methuen and Scarborough mechanics. (T. 34-38, 61 – 63, 104 - 105, *and see* Er. Exs. 6 - 10) Employee counterparts between and among all three locations have identical duties, skills, and qualifications. (*Id.*)

Tractors, trailers, and other equipment are common between the locations. (T. 17 - 18) Tractors and trailers are all registered in Maine. (T. 67) Trailers in particular are constantly

upward to Mr. Fournier, and so is managed in his Methuen job by a superintendent from Scarborough.

moved between Methuen and Wells. (T. 17 – 18, 128) Tractors tend to be assigned to one location, but they are moved between locations at times due to breakdowns, and are also rotated to achieve control of overall mileage, because tractors operating out of Wells accumulate more miles making longer runs to the 154 stores. (T. 18, 118) Drivers use the same onboard computers, a common transportation management system, common email, and a common roadside assistance plan. (T. 78 – 80, 147 - 148) Mechanics at Methuen and Scarborough have the same job classifications and duties, both spend considerable time performing light maintenance and repairs, and as mentioned, the Scarborough operation tends to conduct the heavier repairs for vehicles based at either location. (T. 34 – 38, 63 – 65, *and see* Er. Exs. 9 - 10)

There is a substantial amount of functional integration every day between and among all three sites. On a daily basis, Methuen and Wells supervisors and dispatchers jointly coordinate the trucking operations of both sites. (T. 46 – 47, 68 – 69, 80 – 81, 113 - 114) Every day, drivers from Wells and Methuen travel to the other distribution center to pick up or drop off loads or trailers. (T. 68 – 72, 110 - 112)

Wells drivers can be assigned to make their first run of the day directly to Methuen to pick up a perishable load. (T. 70) It is common for a Wells driver after a first grocery delivery to travel to Methuen to drop off a refrigerated trailer that might have been in use out of Wells, and switch for a dry trailer to be returned to Wells. (T. 68 – 72, 110 - 112) It is common for a Wells driver after a first grocery delivery to travel to Methuen and pick up a refrigerated trailer with a perishable load to be delivered to a store back in Maine. (*Id.*) Methuen drivers making perishable deliveries to stores in the vicinity of Wells routinely pick up “back hauls” (loads from outside suppliers to be returned to Wells) of Poland Springs bottled water or bundled firewood, deliver that trailer back to Wells, switch trailers, and head for Methuen. (*Id.*) A driver from one

location can easily have daily work assignments re-directed during the shift by supervision or dispatch from the other location. (T. 70 – 71, 73 – 74, 81 – 82, 111 – 112, 147-148)

It is common for a Wells driver to have assignments changed mid-shift after making a delivery, resulting in a trip to Methuen for a “back haul” (picking up a load to be driven back to Wells). (T. 132) Wells drivers tend to be in Methuen more often than *vice versa* – six to seven time each day. Methuen drivers tend to travel into Wells once or twice per day, often for the regular “back hauls” to Wells of Poland Springs bottled water or packaged firewood. (T. 68 – 72, 110 - 112) In any case, Methuen drivers are in Wells so frequently that Petitioner’s witness Gary Smith testified that he knew the Methuen drivers by name when he worked for several years as a part-time dispatcher in Wells. (T. 124, 127, 144)

Every day that there is a regular mail delivery, a Methuen driver is assigned to pick up bags of mail at the Shaw’s headquarters, and deliver the mail back to Methuen. From there, Methuen drivers being dispatched that day will be assigned to run the mail to Wells and Scarborough. (T. 72 – 73)

A driver reporting to Wells at the start of a shift may spend about 30 minutes there before departing. During that same shift the Wells driver could easily spend the same amount of time or more at Methuen, picking up or dropping off a load. (T. 73 – 74, 93 - 94) When they are in the distribution centers, drivers share common facilities such as a break room, bathrooms, etc. (T. 74 - 75) When drivers from one location are at the other location, they will directly interact with dispatchers from that location. (T. 74 – 75) Two Scarborough mechanics travel daily to Wells to perform light maintenance and repairs. (T. 76) Scarborough mechanics have traveled to Methuen for training. (T. 77) On other occasions, such as a large purchase of new tires, a Scarborough mechanic traveled to Methuen to ensure proper tire mounting on all the tractors.

(T. 77, 107 – 108)

Labor relations is centralized and standardized among all locations. (T. 50 - 51) All discipline, even low level decisions such as a written warning, are first processed through Anthony Sterner, the Manager of Labor Relations for CWP, whose office is in Methuen. (T. 49 – 51) Suspension and discharge decisions are finalized above Mr. Sterner's level, resting in combination with Director of Transportation Wermuth, his management team, Mr. Sterner, and the Director of Labor Relations, Brian Fitzsimmons, who is at Shaw's. (T. 49 – 51, 101 - 102)

Benefit plans and benefits are standard. (T. 27, *and see* Er. Exs. 2 - 4) All CWP employment policies are standard across all sites. (T. 27, 41 - 43, *and see* Er. Exs. 2 – 5, 11) The Methuen and Wells drivers are all in the same pool for mandatory random drug testing. (T. 88 – 89, *and see* Er. Ex. 5)

There is a standard pay methodology for drivers at both locations. The methodology can result in individual drivers being paid differently from each other – hourly versus mileage – but this is dependent only on the length of routes, not reporting location. (T. 56 - 59, *and see* Er. Ex. 3, at 1 - 2) Mechanics at Methuen and Scarborough work the same schedules, consisting of overlapping day shifts (6:00 AM to 2:30 PM, and 10:00 AM to 6:30 PM) (T. 59 – 60)

There are only a few distinctions in the Board's key unit determination factors between and among Methuen, Wells, and Scarborough, and most are more coincidental than reflective of any intentional management organizational or administrative decisions.

Methuen is open 24 hours per day, seven days per week, and Wells is open seven days per week but closed from 1:00 AM to 5:00 AM daily. (T. 60 - 61) Methuen drivers essentially work shifts with a wide range of overnight starting times, while the Wells drivers essentially work shifts with a wide range of daytime starting times. (T. 60 – 61, 135, 142 - 143)

But this actually reflects only the industry delivery pattern for deliveries of perishables versus dry goods. (T. 60 - 61) At a single-site distribution center – the industry model – perishable deliveries would still run predominantly by night and dry goods deliveries would still run predominantly by day. The retail stores require perishables to be available for stocking in the morning, and so those deliveries tend to be overnight. Dry goods, on the other hand, can be delivered, stored and stocked on a more flexible basis. (*Id.*)

Wells and Scarborough employees are not paid time and one-half for working on Columbus Day, but Methuen employees are. This simply reflects Massachusetts state wage & hour law. (T. 96 – 97).

Mechanics at Methuen and Scarborough are all paid by the hour, but the rate may be slightly higher in Methuen. This simply reflects job market forces in suburban Boston versus 90 miles north in less urban Maine. (T. 56, 104)

Methuen, Wells and Scarborough have separate lower level supervision – but so would the day and night driver shifts in a single distribution center operating on shifts, and so would the mechanical function in a single distribution center.

The Methuen and Wells drivers have separate seniority lists, which affects vacation selections and other seniority-based benefits. This is indeed reflective of the 60 miles between the two locations. But CWP maintains a fixed employee policy allowing transfers between Methuen and Wells with dovetailed seniority resulting upon transfer. (T. 55, *and see* Er. Ex. 4, at 26). Under this policy, “open positions at CWP will be offered to the existing workforce before hiring new associates.” This includes employees at other locations. (*Id.*) Under the policy, seniority rights travel with an employee who changes locations. (*Id.*)

Hiring can be conducted on a site basis – meaning all three sites, Methuen, Wells, and

Scarborough -- but any difficult, *i.e.*, questionable or touchy hiring decisions are referred upward to centralized decision-making by Mr. Wermuth and Mr. Holmes. (T. 47 – 48, 53 - 54)

The Regional Director found that the record does not reflect whether there is much contact between Wells drivers and Methuen drivers in the daily activity whereby they travel to the other location to pick up or deliver loads. (Decision, at 10) But the record does reflect that whatever this level of contact, it equates to the same amount of contact that might occur among the drivers at their own distribution centers.

Starting times for shifts at both Methuen and Wells are staggered widely throughout the shift, and accordingly, so are return times. (T. 60 – 61, 135, 142 - 143) Thus, the voting period in the most recent election (Wells and Scarborough) ran from 9:00 AM to 5:00 PM, an unusually lengthy polling period for only about 70 voters. Had the election been ordered for Methuen, the voting period similarly would have run from 10:00 PM to 6:00 AM. (Decision, at 13; T. 150)

Each driver tends to spend about 30 minutes at the distribution center at the start of the shift before departing on the day's deliveries. (T. 73 – 74, 93 – 94, 133) Drivers also tend to spend about 30 minutes at the other distribution center when picking up or dropping off a load. (*Id.*) Thus, a Wells driver making one of the six or so (on average) runs to Methuen every day is just as likely (or unlikely) to spend some part of 30 minutes with the other drivers at Wells (at the start of the shift), as he is likely to spend some part of 30 minutes with the other drivers at Methuen (when picking up or dropping off a load, and when Methuen drivers might be returning from runs that began hours earlier). (*Id.*)

And as mentioned, the record also reflects that Petitioner's witness Mr. Smith knew the Methuen drivers by name during the years he functioned as a part-time Wells dispatcher. (T. 124, 127, 144)

V. ARGUMENT

A. **Review Should Be Granted Because the Regional Director Incorrectly Overrode Settled Multi-Location Unit Principles With an Inapposite Application of *Specialty Healthcare* Unit Principles.**

The Board should grant review because the Decision raises a substantial question of law or policy due to the absence of, or a departure from, officially reported Board precedent.⁵ The Regional Director concluded this is a case of first impression – a collision between settled principles governing a petition that from the outset seeks a multiple-location unit, and *Specialty Healthcare* principles, under which *any* appropriate unit can proceed to an election. The Regional Director resolved this collision inappropriately.

On the one hand, the Regional Director found that under settled Board case law:

- The Petitioner chose to petition for a multi-location unit consisting of only Wells and Scarborough;
- Under the Board’s multi-location legal analysis, CWP properly advocated for the *smallest appropriate unit* consisting of Methuen, Wells and Scarborough;
- And under that analysis, the Petitioner sought an *inappropriate* unit consisting of only Wells and Scarborough.

(Decision, at 10 – 11)

⁵ It is worth noting that the Decision refers at various times to very specific positions about *case law* purportedly asserted by the parties at the hearing, *e.g.*, “the employer relies on *Specialty Healthcare* ...” (Decision, at 8), and “the application of [the traditional standard for unit determinations in cases involving petitioned-for multi-location units] is not urged by either party ... (Decision, at 10)

Both parties anticipated submitting briefs at the close of the hearing and were surprised that briefs were denied. (T. 155) Given the pell-mell rush that the Board has created with the revised R case procedures since April of 2015, it was gratuitous for the Decision to (mis)characterize highly nuanced legal positions supposedly taken by the parties during summary oral argument at the end of a full day of hearing, with 30 minutes to prepare.

Neither party cited case law in oral argument. A non-attorney Union official represented the Petitioner. CWP contended generally that the Petitioner sought an inappropriate unit, and that CWP sought the only appropriate unit. (T. 155 - 163) CWP’s contentions fit both the traditional analysis for multi-location cases, and analysis based on *Specialty Healthcare* principles. Those contentions also conformed to the issues specifically identified by the Regional Director, pronounced at the start of the hearing. (T. 11)

Yet on the other hand, the Regional Director found that the Union's otherwise *inappropriate* unit (under settled law for multi-location units) was *appropriate enough* to proceed to an election. This decision flowed from a purported harmonizing of the established principles applicable to a petitioner who seeks a multi-location unit, with the principles of *Specialty Healthcare*. (Decision, at 12 – 13)

The Regional Director thus interpreted *Specialty Healthcare* to eradicate and replace a body of settled law governing multi-location unit determinations. In particular, but by no means ending the analysis, the Decision is a *de facto* reversal of *Laboratory Corp. of America Holdings*, 341 NLRB 1079 (2004) and similar cases, where the Board held that even though employees may share a community of interest with others in the *petitioned-for* multi-location unit, that interest must be *separate and distinct* from that which they share with other employees at other facilities of the same employer, or the *petitioned-for* unit will be inappropriate. *Id.*, 341 NLRB at 1083; *see also An Outline of Law and Procedure in Representation Cases* (NLRB Office of the General Counsel), Section 13.00, pp. 152 – 153 (2012).

Thus, in *State Farm Mutual Automobile Insurance Company*, 158 NLRB 925 (1966), the Board rejected a *petitioned-for* multi-location unit because the union sought to include two out of three divisions, a construct that was “neither fish nor fowl” – neither a presumptively appropriate single location, nor an appropriately “amalgamated unit [that] is coherent and sensible for collective bargaining from the standpoint of geographic considerations or the employer’s administrative or operational structure.” 158 NLRB at 930. The Board elaborated: “Consideration of the geographic and administrative factors makes it clear that the Petitioner has asked for either too much or too little by seeking to combine into a single unit only two of the three divisions.” *Id.*

Here, there is no doubt that the interest between Wells and Scarborough is not *separate and distinct* from the community of interest between and among Wells, Scarborough, and Methuen. The Decision relied upon a few threads even to conclude that the Wells *drivers* had a sufficient community of interest with the Scarborough *mechanics* to comprise an appropriate unit. (Decision, at 9 – 10) But the Decision also expressly found that the Wells-Scarborough community of interest – which CWP contends does not comprise an appropriate unit (see below) -- is also by no means *separate and distinct* from the community of interest of the larger unit at issue – Wells, Scarborough, *and* the Methuen drivers and mechanics.

Indeed, the Decision found that among the three locations, a long list of factors dictated that the “petitioned-for unit is inappropriate and that the smallest appropriate unit must also include the Methuen location:” (1) common job classifications; (2) identical duties, skills and qualifications; (3) common supervision; (4) functional integration; (5) shared equipment; (6) common repair facilities; (7) common parts ordering and distribution; (8) common safety supervision and administration; (9) common safety committee; (10) identical equipment and systems; (11) interpersonal contact; (12) central labor relations; (13) common pay methodology; (14) identical benefits; and (15) common policies and procedures. (Decision, at 10 – 11)

Review should be granted for this reason alone.

B. Review Should Be Granted Because Even Under *Specialty Healthcare* the Petitioner Sought a Unit Fragment.

Review should be granted because the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record, and such record prejudicially affects the rights of a party. Even under *Specialty Healthcare*, the petition sought a unit fragment, not an appropriate unit.

The *Specialty Healthcare* judgment about whether community of interest factors “overlap almost completely” is plainly a mixed question of law and fact. Given the single peculiar fact that this food store distribution employer is located in three places stretched across 90 miles – an accident of history, not a functional design -- it is difficult to imagine a *more* fully integrated and interdependent operation creating an “almost completely overlapping” or “overwhelming” community of interest among the employees.

Against the great weight of *completely* overlapping factors (management, job classifications, job skills and duties, vehicles and equipment, daily interpersonal contact, dispatching, parts ordering, safety administration, labor relations, pay methodology, benefits, policies and procedures), the Decision (at 10) strings together a list of minor differences, most of which would either exist even if the operations were all in one location, or which are simply reflective of external, state-based influences, not management design:

- Separate low level supervision (which would be true in a shift operation at a single location)
- Separate hiring (but with centralized control, and which could also easily be true in a shift operation at a single location)
- Different hours (which would be true at a single location, because perishables are delivered for morning stocking at the stores, and dry goods are not)
- Separate seniority lists (which could easily be true for shift work at a single location, and moreover, which affects the petitioner’s desired Wells-Scarborough unit as much as it would CWP’s proposed Methuen-Wells-Scarborough unit; and, on the other hand, which is also governed by a published policy providing for dovetailing of seniority whenever an employee moves from one location to another)
- Wells drivers often paid by the mile, Methuen by the hour (under the exact same pay methodology, and therefore not even a different term or condition of employment)

- Methuen mechanics' hourly pay slightly exceeds Scarborough mechanics (a function only of labor market forces between suburban Boston and less urban Scarborough, Maine)
- Different pay practices for work on Columbus Day (a function only of state wage & hour law)
- Lack of permanent transfers or temporary interchange between locations (which has some weight, but is the only factor with any weight)
- Some level of interpersonal contact between employees from their respective locations (which may be just as much between Wells drivers themselves, as between Wells-Methuen drivers, given the widely staggered start and finish times for deliveries and the daily runs of Wells drivers into and out of Methuen).

From this list, the only factors with any genuine weight are the separate seniority lists among the locations, and the lack of permanent transfers or temporary interchange. Against the long list of far more important factors that are completely overlapping, the facts plainly present a case of “almost completely overlapping” or “overwhelming” community of interest factors. The Decision’s conclusion to the contrary is clearly erroneous on the record.

Review should also be granted for this second reason.

C. Review Should Be Granted Because Even Under *Specialty Healthcare* the Petitioner Sought an Inappropriate Combination of Employee Groups Whose Community of Interest Was Less Than the Community of Interest With the Excluded Employees.

Review should be granted because, in other ways, the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record, and such record prejudicially affects the rights of a party. Even under *Specialty Healthcare*, the petition sought an inappropriate combination of two employee groups whose community of interest was less than the community of interest with additional employee groups that the Petitioner sought to exclude.

The Decision transgresses the Board’s own limits placed upon careless or overbroad applications of *Specialty Healthcare*. In *Odwalla, Inc.*, 357 NLRB 1608, 1612-1613 (2011), the

Board applied *Specialty Healthcare* to find that a proposed unit was *inappropriate* because (as here) it included additional employees who had *less* of a community of interest with one another than the group did with the excluded employees. *Id.*, at 1612-1613.

Thus, it is plain that Wells and Methuen drivers have a hugely overlapping community of interest. But the Petitioner sought a unit of Wells *drivers* and Scarborough *mechanics*, proposing to exclude Methuen *drivers and mechanics*. In this, the Petitioner sought exactly the kind of unit found inappropriate in *Odwalla* even under *Specialty Healthcare* principles.

Here, as in *Odwalla*, “... none of the Board’s traditional community-of-interest factors suggests that all the employees in the [Petitioner’s proposed Wells-Scarborough] unit share a community of interest that the [Methuen drivers and mechanics] do not equally share, such that the community-of-interest factors would reasonably support drawing the unit’s boundaries to include the [Wells drivers and Scarborough mechanics] but *not* the [Methuen drivers and mechanics].” *Id.*

As in *Odwalla*, here the Petitioner’s proposed two-location unit does not track any lines drawn by CWP, “such as classification, department, or function;” it purports to include Scarborough mechanics with Wells drivers while excluding Methuen mechanics and drivers; it is not drawn along functional lines; it is not structured along lines of supervision; it is not drawn in accordance with methods of compensation; and it is not even drawn along lines of work location. *Id.*

Review should also be granted for this third reason.

D. Review Should Be Granted Because The Decision Does Not Explain Why the Petitioned-For Group Has Distinct Interests That Outweigh All the Similarities With the Methuen Drivers.

Review should be granted because, in other ways, the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such record prejudicially affects

the rights of a party; and further, this creates compelling reasons for reconsideration of an important Board rule or policy.

In *Constellation Brands, U.S. Operations, Inc. v NLRB*, 842 F. 3d 784 (2nd Cir. 2016), the Second Circuit reversed and remanded the Board’s application of *Specialty Healthcare* unit determination principles, because the Board failed to explain the legal significance of purported factual differences between employees in the petitioned-for unit and employees outside that unit that the employer advocated for inclusion. The court admonished that the Board must consider whether the petitioned-for unit employees have interests that are “separate and distinct” from employees that the petitioner proposes to exclude.

Here, as in *Constellation Brands*, the Decision does not explain why the petitioned-for Wells-Scarborough unit has distinct interests, and why those purportedly distinct interests outweigh all the similarities with the excluded Methuen drivers and mechanics. The Second Circuit has instructed that in applying *Specialty Healthcare* principles:

... [T]he Board must analyze ... the facts to ... explain why excluded employees have meaningfully distinct interests in the context of collective bargaining that *outweigh* similarities with unit members. Merely recording similarities or differences between employees does not substitute for an explanation of how and why these collective bargaining interests are relevant and support the conclusion. Explaining why the excluded employees have distinct interests in the context of collective bargaining is necessary to avoid arbitrary lines of demarcation and to avoid making ... *Specialty Healthcare* a mere rubber stamp.

Constellation Brands, supra, at pp. 794-795.

The Decision suffers from the same inadequacies as the Regional Director’s decision criticized in *Constellation Brands* – the Decision does not explain the weight or relevance of the factual findings, merely recites differences and (more often) similarities between and among Methuen, Wells and Scarborough, and then draws an arbitrary conclusion that Wells and Scarborough alone have interests that form an appropriate unit for collective bargaining – despite

the far more weighty list of factors in common with Methuen.

Review should also be granted for this fourth reason.

E. Review Should Be Granted Because the Regional Director Improperly Allowed Extent of Organization to Control the Unit Determination.

Review should be granted because there are compelling reasons for reconsideration of an important Board rule or policy. Based on all the above, the Decision also becomes a thin cover allowing extent of organization to control the unit determination.

Only 17 months before filing the instant petition, an affiliate of the Petitioner lost an election by a substantial margin in a stipulated voting unit of all three locations. That 2015 stipulated voting unit conformed to the Regional Director's 1999 unit decision about CWP. After the 2015 loss, the Petitioner tried again, extracting one location of drivers, yardmen and mechanics, and disjointedly seeking only the other two locations, one involving drivers and yardmen and the second involving mechanics.

It is blatant that the extent of organization drove the scope of this latest petition, and the Board should not apply its principles to countenance that which the Act forbids under Section 9(c)(5). Review should also be granted for this fifth reason.

VI. CONCLUSION

For all the reasons set forth above, the Board should grant review of the Decision.

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Certificate of Service

I hereby certify that a copy of the forgoing brief was served upon the following on March 20, 2017:

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